No. 10-138

IN THE

SUPREME COURT OF THE UNITED STATES

VICTOR MADEJA

*Petitioner*

v.

PENNSYLVANIA
(UNIFIED JUDICIAL SYSTEM)

*Respondent*

ON PETITION FOR REHEARING
ON A WRIT OF CERTIORARI
TO THE U.S. SUPREME COURT

# PETITION FOR REHEARING

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## SUMMARY OF QUESTIONS PRESENTED

The essential question presented is if judges have a right to violate individual liberty and Due Process as plainly stated in the words of the federal constitution? This was originally presented in four parts

1. When are statutes related to vehicle speeding unconstitutional in terms of the *de jure* authority of State Legislatures because they violate "a right to travel?"

2. Even if statutes of any kind are constitutional, is imposition of summary judgement after denial of jury trials a violation of Due Process under federal law?

3. Within the scope of the existing 13th Amendment, can U.S. citizens be "duly convicted" into slavery by summary judgement under criminal law when the enacting government units are either unequal or acting separately?

4. Are local judges or magistrates permitted to claim and retain any emolument or title of honor beyond that of their fellow citizens?

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## ADDED AUTHORITIES CITED

1. Supreme Court of the United States, W. Victor Madej, Petitioner v. Air Products & Chemicals No. 88-740 Petition for a Writ of Certiorari Denied on 9 January 1989

2. Supreme Court of Pennsylvania, Eastern District, W. Victor Madej, Petitioner v. Air Products & Chemicals No. 950 N.D Allocatur Docket 1987; Allowance of Appeal Denied on 22 June 1988.

3. Message to Congress of July 4 1861, by President Lincoln.

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* The word count, inclusive of pages 6 to 14, was 2712. This word count includes footnotes and verbatim quotations required under Rule 14.1(f) to emphasize text in the Appendix but it does not include the page containing the questions presented (as restated), the list of parties, the table of contents, the table of cited authorities or appendix.

## LIST OF PARTIES

The list of parties is unchanged from the original, which named individual judges who were involved in the decision. When the *Petition* denial (per Appendix A) arrived however, their names were not listed and the case had been renamed as petitioner versus "Pennsylvania." This was incorrect because it did reflect the goal of imposing a standard of STRICT SCRUTINY on the Judicial Branch of Pennsylvania,* which now seems to have adapted standards of the British Commonwealth. Several other states use Commonwealth in their name so this will offer an opportunity to clear up the nature of that status.

Because these judges have conferred an almost royal prerogative upon themselves petitioner claims that they may have violated their oath to the U.S. Constitution. This charge probably goes beyond the scope of those named and could involve the Judicial System; i.e., decisions to exceed the standards of the federal constitution are systemic more than individual. Perhaps the matter could have sought *mandamus* against a so-called "Unified Judicial System." That idea was rejected due to doubts pertaining to *standing*. Petitioner has no claim here against other judges or the Legislative or Executive branches of the government of Pennsylvania at large.

Other judges might instead decide to act within the scope of a jury system when plaintiffs make such a demand. In fact, the state constitution assures that citizens are protected by jury trials. Since it implies a promise of Due Process, there seems to be no direct cause of action against other parts of the state government (beyond the named judges). Even so, the cover sheet adds wording for "UNIFIED JUDICIAL SYSTEM" to reflect that this broader possibility was considered.

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* The mechanics of imposing this remedy, or any other, were beyond the scope of the Petition.

## Reasons for Granting the Petition

The essential question should not have been considered politically moot. The Petition placed emphasis on FREEDOM OF MOVEMENT but the focus was on *Due Process* or balancing citizen rights against judicial whim. The *capability* to infringe fundamental individual rights by jailing citizens, for up to six months, appears to be an outrageous imposition.

The vast increase in the rate of incarceration since the Pennsylvania Supreme Court gave itself such power in 1968 (by case law) shows how a capability is now plausibility. Petitioner considered how a judge (police officer, or politician, or similar official) who does not serve the public could be a parasite. At worst, they can be implicated in forms of racketeering if they act for personal gain. They can even be accused of sedition if they place local government above federal jurisdiction and Thomas Paine's letter (at Appendix H) outlines imposition of an English legal system.

If Pennsylvania violates *Due Process*, it was my hope that the Supreme Court will somehow apply a remedy wherein acceptable laws, statutes, and the implementing agencies are tailored to further compelling public interests beyond raising revenue for corporate units acting under the color of local governments. Without forceful federal intervention, it now seems that many Pennsylvania judges will not watch over the Life, Liberty, and Pursuit of Happiness of fellow citizens or undo harmful legal changes.

## Past Cases Involving Petitioner

In the 1980s the petitioner pursued a case involving breach of contract against a local corporation. (*see W. Victor Madej,* v. Air Products & Chemicals*). A Lehigh County Judge (John E. Backenstoe) dismissed two counts one year and two the next, without allowing the demanded jury trial.

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*Variant of my last name (patronymic) used during military tenure.

The final decision hinged on the fact that the Pennsylvania Supreme Court had *reversed* a similar case (in favor of *General Electric*) wherein a jury in Philadelphia had found for the Plaintiff. The specifics of that case are not important here except to note that I believed both the denial of a jury trial and application of questionable precedent to be a criminal matter and pursued it as such.*

Another minor case involved the issue described here in Appendix F. The *Order* of Judge Dantos seemed unworthy of full mention in the Petition but seems an example of practicing law from the bench. I arrived at the designated time and place and was kept waiting for much of a working day until the police officer later phoned in that he had problem with his leg. When I made a motion that the case be dismissed (in those words), it was the judge who granted the continuance, without apparent involvement by the assistant District Attorney. The next appearance, under Judge Anthony, also involved another assistant District Attorney. Added to the other facts, the incident indicated how the Summary Trials were a form of assembly line justice.

### Thomas Paine and Constitutions

A standard rebuttal to appeals such as mine by members of the court is that they do not understand. For example, in presenting the issue in a single paragraph to the Superior Court on 31 July 2009, the Deputy District Attorney (Mr. Jeffrey Dimmig) suggested that the claim should be waived for my failure to provide an "intelligible" statement of errors. The Superior Court echoed this with a further claim that I was never placed "in jeopardy of incarceration of more than six months."

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*The federal courts and Justice Department would not act on the matter but it still seemed appropriate to file criminal complaints. That is what we would do if someone hijacked our car and here something more valuable was taken.

In fact the courts substantially understated the fines or fees and their threat of extended incarceration was real, as illustrated by the Luzerne County example that I provided (among others). The mechanism is also through "Contempt of Court" citations if defendants do not pay a fine or, for some reason, fail to appear. The key point is that summary trials by highly paid judges and magistrates certainly have nothing to do with the standard of being judged by peers, stipulated as early as 1215.

To avoid accusations of being less than "intelligible" Thomas Paine's Letter on CONSTITUTIONAL REFORM (1805) is provided as Appendix H. In his best selling *Rights of Man* (Part I), Paine also pointed out how earlier colonial charters and the ARTICLES OF CONFEDERATION had inspired American Independence, he noted:

> "The American constitutions were to liberty what a grammar is to language: they define its parts of speech, and practically construct them into syntax."

This Appendix shows that my concern of infiltration of English law into Pennsylvania is not new. The escalated prison population indicates that it is not frivolous. The primary question is if it violates the U.S. Constitution.

## CONSTITUTION & CONSTITUTIONALISM

The definitions provided as Appendix I examine the scope of Constitutional laws. The relationship to Due Process should be self-evident. What might not be clear is how the English have a far different understanding of the same terms. For example, their officials still swear allegiance to the crown but they still talk of having a written constitution, Under their system, *Constitutional law* denotes the legal rules which define and delimit the structure and powers of the organs of government.

As is almost universally the case, apart from the United Kingdom, a collection of the rules relating to the organization of government is contained in a written document.

British *constitutional law* or *the constitution* refers primarily to codified rules, often extended by legal interpretation in the courts. Their written constitutions may contain provisions, which directly indicate or describe the duties of government, ~~but are~~ not always enforceable rules of law.

They may sometimes be easily changed, as when the Queen shut down the Canadian parliament (for almost two months) on 4 December 2008. In the United Kingdom a great many conventional principles are generally thought of as forming part of the constitution. This use/abuse of the term is still common in Great Britain and presupposes the existence of 'maxims' which are inferences about the correct behavior of the organs of government drawn from rules which traditionally *have* been obeyed. Sir Ivor Jennings specified four categories of rules which could figure in a written constitution if they had one in the United Kingdom: (a) legislation; (b) case law; (c) the law and custom of Parliament; (d) conventions.

According to the description of the titular head of state (*monarchical* or *republican*), relation between executive and legislature (*cabinet* vs. *presidential government*, and manner of distribution of legislative power (*federal* or *unitary* government) another distinction has turned upon the status of constitutional instruments. They are sometime distinguished between 'rigid' and 'flexible' systems. In flexible systems a *material* constitution may exist where there is no special formality for particular classes of legislation or for amendment of constitutional law (or *sovereignty*).

Where the question is not settled by a written document, administrative laws are assumed to govern routine structure under the rubric of *Public Law* or statutes. My Petition did not deny that judges could make routine decisions with consent of the plaintiffs and defendants. What it strongly objects to -- possibly as a matter of sedition -- is imposition of British styled laws by summary trials, especially if the defendant can be imprisoned *even for a day*.

## CURRENT IMPLICATIONS OF CORPORATISM

The last section (D) of Appendix K ends with the:

"Above all, the American business corporation, like the ancient Roman corporation, is not a creature of the state, but comes into existence when individual citizens spontaneously band together for what ever purpose, as long as it is legal."

Having written several books about militarism and fascism during World War 2, I take exception to this position. First, just because something is legal does not mean it is moral, as in the case of the Nazi Holocaust or plans for nuclear genocide by the United States. Moreover, something that for a time might be considered legal could later be found unconstitutional. The case of slavery is an obvious example. As important, slavery was not the cause of the greatest bloodshed of American history.

The American Civil War was caused by an attempted imposition of state rights in the South. The "Message to Congress" by President Lincoln on July 4 1861 explains that position better than I could. However, my argument in the Petition, at Appendix D, went further. It defined the separate and unequal local governments in Pennsylvania, over 4800 in number, as a form of corporatism that often worked together with commercial business entities in order to circumvent the written law of the federal constitution. A better analogy than state rights might be something like "plantation rights" except that the government units in the South of 1861 were not yet organized along corporate lines.

Having worked for three FORTUNE 500 corporations, I could offer testimony as to how such a process could be implemented to bypass regulations in order to enrich business entities and employees of various government units. Given recent scandals involving Wall Street and various other corporations, it seems unnecessary. The point is that judges are an important part of such imposition if they look away.

Getting back to the assertion that it is unlike fascist corporatism if "individual citizens spontaneously band to-

gether for whatever purpose". Suppose citizens with blue eyes decided to "band together" for the purpose of granting themselves special economic and legal advantages, would not the many excluded citizens consider themselves to be victims of discrimination (if not racism)? In fact, banding together to seize power was the basis of fascism. Using "legal" means to impose economic power does not exclude fascism.

Most Americans are unable to distinguish among capitalism, fascism, and corporatism but the founders did want corporations running the country. I believe that the definition of Corporatism adequately addresses my concern and will not belabor the idea of fascism* The position taken is that even if the obstruction of justice were a form of aristocracy or corporatism – not fascism – then corrective action would be warranted. For example, Mussolini's concept of a *Chamber of Fasces and Corporations* resonates with forms of the U.S. Chamber of Commerce and its undue privileges.

A new study by the progressive Constitutional Accountability Center compares how the Chamber of Commerce fared before the Supreme Court in the early 1980s (the last time that none of the Court's present members were justices) to their record before the Roberts Court. Justice Lewis Powell, arguably the most pro-corporate member of the Burger Court, drafted an influential memo for the Chamber laying out a blueprint for the Chamber to influence American politics and judicial decisions. Perhaps he was the visionary behind the Chamber's influence over of the Courts, but the present majority seems to embrace this takeover far more than even Powell believed acceptable.

Koch Industries, a longtime underwriter of libertarian causes from the *Cato Institute* in Washington, plans a confidential meeting at the Rancho Las Palmas Resort and Spa

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* The same Dictionary defines *Fascism*, by a Cornelius P. Cotter, but its focus is on the specific Italian form and Nazi variant. The definition presented here better examined the broader imposition.

to (as an invitation says) "develop strategies to counter the most severe threats facing our free society and outline a vision of how we can foster a renewal of American free enterprise and prosperity." The invitation to a four-day meeting with the Koch network of ultrawealthy and politically connected members of the US Chamber of Commerce was by a personalized letter signed by Charles Koch. It opens with a grand call to action: "If not us, who? If not now, when?"

Koch Industries, a Wichita-based energy and manufacturing conglomerate run by billionaire brothers, operates a foundation that finances political advocacy groups, but tax law protects such groups from having to disclose much about what they do and who contributes. Charles and David Koch, America's third and fourth richest men, (Forbes magazine calculates Charles's wealth at about $21.5 billion) have a mostly inherited fortune from Koch Industries, which specializes in industries like oil, mining, fertilizers and ranching. They also own the logging company Georgia Pacific and founded the *Cato Institute*, a conservative marketing firm. Their father helped found the secretive *John Birch Society* and the Koch network meets twice a year to plan and expand its efforts — as the letter says, "to review strategies for combating the multitude of public policies that threaten to destroy America as we know it."

Those efforts, the letter makes clear, include countering "the move to socialized health care," as well as "the regulatory assault on energy". The goals, the brochure says, include building institutions "to identify, educate and mobilize citizens". It argues that "prosperity is under attack by the current administration and many of our elected officials" and repeatedly warns about the "internal assault" and "unrelenting attacks" on freedom and prosperity. A brochure with the invitation underscores how "freedom" means freedom from taxes and government regulation. The Kochs insist on strict confidentiality and advise participants that it is closed to the public and media, except for news agencies that do not report on the meetings.

Past participants included some of the nation's wealthiest families and biggest names in finance and longtime Republican donors and officials, including former Attorney General Edwin Meese III, Justices Antonin Scalia and Clarence Thomas of the Supreme Court, Gov. Haley Barbour and Gov. Bobby Jindal, Senators Jim DeMint and Tom Coburn, and Representatives Mike Pence, Tom Price and Paul D. Ryan. Koch concludes his invitation with: "This is a gathering of doers who are willing to engage in the hard work necessary to advance our shared principles. Success in this endeavor will require all the help we can muster".

There are still more questions than answers about Koch tentacles but back in the Nixon era, it seemed crazy that a President – even Nixon – would try to rig an election. It's easier to believe corporatists might "band together" to do so, especially since the Koch brothers tried it at least once before.

I do not know if the "Citizens United" decision was part of a conspiracy based on corporatism, but the court – by a vote of five to four – gutted the McCain-Feingold campaign finance reform law. Justices Scalia and Thomas voted with the bare majority (Thomas even wrote that the ruling didn't go far enough). Arguably, by opening the floodgates to secret funding of elections,* no decision in modern times has given such a big political advantage to the rich.

Although no proof yet exists that the Kochs had a funding role in Citizens United decision, it is reasonable to

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*As the Justices could have easily discovered, the IRS allows nonprofits to register as "social welfare" organizations under Section 501 c (4) – and lets them support "independent" campaign advertising without disclosing the names of donors, so long as their "primary activity" is not political advocacy. The FEC ruled, in a divided opinion, that a donor who funds political advertising campaigns need not be disclosed unless the money was provided for a "particular advertisement." In practice, as former Republican FEC commissioner Trevor Potter said, that is an impossible standard that permits any donor to remain anonymous, no matter how much they or a corporation gives.

ask if it were possible to engineer a court case on which those two justices could influence a desired outcome. I am unable to measure such *capability* but now that we know that they attended Koch's political planning meetings, it seems reasonable to ask Justice Scalia and Thomas to recuse themselves from participating in this case.

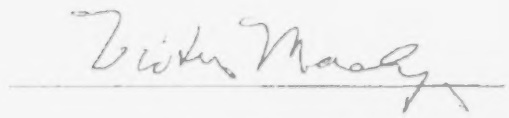
The imposition of imprisonment by magistrates and the arbitrary rule by rich corporate directors is related because slavery and aristocracy are two sides of the same coin.

## CONCLUSION

The question raised was a simple one. Did the founders want a government by the people and their juries or was it to be an aristocracy of magistrates and corporations? Since the War for Independence revoked royal charters I believe that the situation deserves a clear decision, even if defining its enforcement might not be easy.

Therefore, the petition for certiorari should be granted.

Respectfully submitted,



VICTOR MADEJA, *pro se*

Date: October 28, 2010

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E. October 4, 2010, Writ of Certiorari Denied

In The Supreme Court of the United States

Office of the Clerk

**Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

October 4, 2010

Mr. Victor Madeja
P.O. Box 3385
Allentown, PA 18106

Re: Victor Madeja
v. Pennsylvania
No. 10-138

Dear Mr. Madeja:

The Court today entered the following order in the above-entitled case: The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

F. 25 November 2008 Order by Judge Dantos

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | ) | Case No. SA-206-2008 |
| vs. | ) | Citation No. B49876816 |
| | ) | Prosecutor William Lendvay, USPD |
| | ) | Surcharge Speeding (65/45) |
| Victor Madeja | ) | Defense Atty. no counsel |
| | | District Atty. Heather Gallagher |

ORDER

NOW, November 25, 2008, after hearing held this date { Checklist Format with block for "Other" crossed }

The within matter shall be continued and shall be relisted at the call of the District Attorney.

BY THE COURT:

{ Judge Maria Dantos }

## G. Routine Corrections to Original Petition

Except for the last item, corrections to the original were noted in a letter to the Office of the Clerk on 23 July 2010 (along with the original signed copy of the *Petitition*). The changes are as follows on pages:

*11* - last two lines: ...an effort to understate the costs involved, this seems to now be a routine part of the...

*14* - 10th line: change "the idea" to "of their ideas."

*18* - change in lines 8-9 to "...from the bench negates judicial jurisdiction. I believe , as stated in the state and ..."

*22* - 2nd line should end in question mark.

*27* - 9th line is indicates (no "s"); 14th line: delete "With".

*28* - 4th line add "be" after "can"; 15th line: simply (not "e").

*31* - Lines 4-5: "...method? I further argues that...".

*33* - 6th line: replace last word "for" with "seems".

*34* - 11th line: "could go along". 14th line: firm not "dirm".

*35* - 3rd line: delete first "a".

*38* - 5th line: is not "us".

Appendix D (*page A-12*) - 5th line in table PA 4,988 not "US"

Added change to Appendix D (not in 23 July letter):

*page A-13* - 16th line: delete "so".; after "519" add "or the state of Maryland with under 220".

## H. Letter on Constitutional Reform (Paine, 1805)

### To the Citizens of Pennsylvania on the Proposal For Calling a Convention

(From Life and Writings of Thomas Paine, edited by Daniel E. Wheeler (1908 edition, Vol. 10 267-304), on web see: http://socserv.mcmaster.ca/econ/ugcm/3ll3/paine/index.html. It was written by Thomas Paine thirty years after he drafted **Common Sense**, arguably America's most powerful political document. In contrast to the brief mention of this in the Writ, his published "Letter" is largely reproduced here because the message is appropriate to the facts of the appeal; especially when studied with the **Compass** of "thoughts and historical references" that was also originally attached. The occasion was a proposed revision of Pennsylvania's constitution, partly motivated by invention of Judicial Review by the fourth Chief Justice.

*This presentation sometimes uses modern spelling ("has" for hath) but avoids word changes, merely if an older form is confusing (ex. "negative"). Some original footnotes, marked "*" are in the text while a few paragraphs, noted in brackets, were removed to avoid distraction. Criticism of British monarchy is still partly applicable because the Hanoverian "living constitution" of the same house (Windsor) is still partly in power. )*

As I resided in the capital of your State, Philadelphia, in the *time that tried men's souls,* and all my political writings, during the Revolutionary War, were written in that city, it seems natural for me to look back to the place of my political and literary birth, and feel an interest for its happiness. Removed as I now am from the place and detached from everything of personal party, I address this token to you on the ground of principle and in remembrance of former times and friendships.

The subject now before you is the call of a Convention to examine and, if necessary, to reform the Constitution of the State; or to speak in the correct language of constitutional order, to propose written articles of reform to be accepted or rejected by the people by vote, in the room of those now existing that shall be judged improper or defective.

There cannot be, on the ground of reason, any objection to this; because if no reform or alteration is necessary the sense of the country will permit none to be made; and, *if necessary,* it will be made because it *ought* to be made. Until, therefore, the sense of the country can be collected and made known by a convention elected for that purpose, all opposition to the call of a convention not only passes for nothing, but serves to create a suspicion that the opposers are conscious that the Constitution will not bear an examination.

The Constitution formed by the Convention of 1776, of which Benjamin Franklin (the greatest and most useful man America has yet produced), was president, had many good points in it which were overthrown by the Convention of 1790, under the pretence of making the Constitution conformable to that of the United States; as if the forms and periods of election for a territory extensive as that of the United States is could become a rule for a single state.

The principle defect in the Constitution of 1776 was that it was subject, in practice, to too much precipitancy; but the groundwork of that Constitution was good. The present Constitution appears to me to be clogged with inconsistencies of a hazardous tendency, as a supposed remedy against precipitancy that might not happen. Investing any individual, by whatever name or official title he may be called, with a negative power over the formation of the laws, is copied from the English Government, without ever perceiving the inconsistency and absurdity of it, when applied to the representative system, or understanding the origin of it in England.

The present form of government in England and all those things called prerogatives of the Crown, of which this negative power is one, was established by conquest, not by compact. Their origin was the conquest of England by the Normans, under William of Normandy, surnamed the Conqueror, in 1066, and the genealogy of its king takes its date from him. He is the first of the list.

There is no historical certainty of the time when parliaments began; but be the time when it may, they began by what are called grants or charters from the Norman Conqueror, or his successors, to certain towns and to countries, to elect mem-

bers to meet and serve in Parliament, [* a French word, brought by the Normans; from the verb *parler* --to speak] subject to his control; and the custom still continues with the King of England calling the Parliament *my Parliament;* that is, a Parliament originating from his authority, and over which he holds control in right of himself, derived from that conquest.

It is from this assumed right, derived from conquest, and not from any constitutional right by compact, that kings of England hold a negative over the formation of the laws, and they hold this for the purpose of preventing any being enacted that might abridge, invade or in any way diminish what they claim to be their hereditary or family rights and prerogatives, derived originally from the conquest of the Country.* This is the origin of the King of England's negative. It is a badge of disgrace which his Parliaments are obliged to wear, and to which they are abject enough to submit.

But what has this case to do with a legislature chosen by freemen, on their own authority, in right of themselves? Or in what manner does a person st*y*led Governor or Chief Magistrate resemble a conqueror subjugating a country, as William of Normandy subjugated England, and saying to it, *you shall have no laws but what I please?*

The negativing power in a country like America is of that kind that a wise man would not choose to be embarrassed with it, and a man fond of using it will be overthrown by it. It is not difficult to see that when Mr M'Kean negatived the Arbitration Act, he was induced to it as a *lawyer,* for the benefit of the profession, and not as a *magistrate,* for the benefit of the people; for it is the office of a chief magistrate to compose differences and *prevent* lawsuits.

If the people choose to have arbitrations instead of lawsuits, why should they not have them? It is a matter that concerns them as individuals, and not as a state or commu-

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* When a king of England (for they are not an English race of kings) negatives an act passed by the Parliament, he does it in the Norman or French language, which was the language of the Conquest, the literal translation of which is, *the king will advise himself of it.* It is the only instance of a king of England speaking French in Parliament and shows the origin of the negative.

nity, and is not a proper case for a governor to interfere in, for it is not a state or government concern: nor does it concern the peace thereof, otherwise than to make it more peaceable by making it less contentious.

This negativing power in the hands of an individual ought to be constitutionally abolished. It is a dangerous power. There is no prescribing rules for the use of it. It is discretionary and arbitrary, and the will and temper of the person at any time possessing it, is its only rule. There must have been a great want of reflection in the Convention that admitted it into the Constitution. Would that Convention have put the Constitution it had formed (whether good or bad) in the power of any individual to negative? It would not. It would have treated such a proposal with disdain. Why then did it put the legislatures thereafter to be chosen, and all the laws, in that predicament?

Had that Convention, or the law members thereof, known the origin of the negativing power used by kings of England, from whence they copied it, they must have seen the inconsistency of introducing it into an American Constitution. We are not a conquered people; we know no conqueror; and the negativing power used by kings in England is for the defence of the personal and family prerogatives of the successors of the conqueror against the Parliament and the people. What is all this to us? We know no prerogatives but what belong to the sovereignty of ourselves.

At the time this Constitution was formed, there was a great departure from the principles of the Revolution, among those who then assumed the lead, and the country was grossly imposed upon. This accounts for some of the inconsistencies that are to be found in the present Constitution, among which is the negativing power, inconsistently copied from England. While the exercise of the power over the state remained dormant it remained unnoticed; but the instant it began to be active it began to alarm; and the exercise of it against the rights of the people to settle their private pecuniary differences by the peaceable mode of arbitration, without the interference of lawyers, and the expense of tediousness of courts of law, has bought its existence to a crisis.

Arbitration is of more importance to society than courts of law, and ought to have precedence of them in all cases of pecuniary concerns between individuals or parties of them. Who are better qualified than merchants to settle disputes between merchants, or who better than farmers to settle disputes between farmers? And the same for every other description of men. What do lawyers or courts of law know of these matters? They devote themselves to forms rather than to principles, and the merits of the case become obscure and lost in a labyrinth of verbal perplexities. We do not hear of lawyers going to law with each other, though they could do it cheaper than other people, which shows they have no opinion of it for themselves.

The principle and rule of arbitration ought to be constitutionally established. The honest sense of a country collected in convention will find out how to do this without the interference of lawyers, who may be hired to advocate any side of any cause; for the case is the practice of the bar is becomes a species of prostitution that ought to be controlled. It lives by encouraging the injustice it pretends to redress.

Courts in which law is practised are of two kinds: The one for criminal cases, the other for civil cases, or cases between individuals respecting property of any kind or the value thereof. I know not what may be the numerical proportion of these two classes of cases to each other; but that the civil cases are far more numerous than the criminal cases, I make no doubt of. Whether they be ten, twenty, thirty or forty to one, or more, I leave to those who live in the state, or in the several counties thereof, to determine.

But be the proportion what it may, the expense to the public of supporting a judiciary for both will be, in some relative degree, according to the number of cases the one bears to the other; yet it is only of them that the public, as a public, have any concern with. The criminal cases, being breaches of the peace, are consequently under the cognisance of the government of the state, and the expense of supporting the courts thereof belongs to the public, because the preservation of the peace is a public concern.

But civil cases, that is, cases of private property between individuals, belong wholly to the individuals themselves; and all that government has consistently to do with the matter is to establish the process by which the parties concerned shall proceed and bring the matter to decision themselves, by referring it to impartial and judicious men of the neighbourhood, of their own choosing. This is by far the most convenient, as to time and place, and the cheapest method to them; for it is bringing *justice home to their own doors*, without the chicanery of law and lawyers.

Every case ought to be determined on its own merits, without the farce of what are called precedents, or reports of cases; because in the first place, it often happens that the decision upon the case brought as a precedent is bad, and ought to be shunned instead of imitated; and in the second place, because there are no two cases perfectly alike in all their circumstances, and therefore, the one cannot become a rule of decision for the other. It is justice and good judgement that preside by right in a court of arbitration. It is forms, quotes precedents and contrivances for delay and expense to the parties, that govern the proceedings of a court of law.

By establishing arbitrations in the room of courts of law for the adjustment of private cases, the public will be eased of a great part of the expense of the present judiciary establishment; for certainly such a host of judges, associate judges, presidents of circuits, clerks and criers of courts, as are at present supported at the public expense, will not then be necessary. There are, perhaps, more of them than there are criminals to try in the space of a year.

Arbitration will lessen the sphere of patronage, and it is not improbable that this was one of the private reasons for negativing the arbitration act; but public economy, and the convenience and ease of the individual, ought to have outweighed all such considerations. The present Administration of the United States has struck off a long list of useless officers, and economised the public expenditure, and it is better to make a precedent of this, than to imitate its forms and long periods of election, which require reform themselves.

A great part of the people of Pennsylvania make a principle of not going to law, and others avoid it from prudential reasons; yet all those people are taxed to support a judiciary to which they never resort, which is inconsistent and unjust as it is in England to make the Quakers pay tithes to support the Episcopal Church. Arbitration will put an end to this imposition.

Another complaint against the Constitution of Pennsylvania is the great quantity of patronage annexed to the office of governor.

Patronage has a natural tendency to increase the public expense by the temptation it leads (unless in the hands of a wise man like Franklin) to multiply offices within the gift or appointment of that patronage. John Adams, in his Administration, went upon the plan of increasing offices and officers. He expected by thus increasing his patronage, and making numerous appointments, that he should attach a numerous train of adherents to him who would support his measures and his future election.

He copied this from the corrupt system of England; and he closed his midnight labours by appointing sixteen new unnecessary judges, at an expense to the public of $32,000 annually. John counted only on one side of the case. He forgot that there was one man to be benefited by an appointment, all the rest had to pay the cost of it; and that by attaching the one to him by patronage, he ran the risk of losing the many by disgust. And such was the consequence; and such will ever be the consequence in a free country, where men reason for themselves and from themselves, and not from the dictates of others.

The less quantity of patronage a man is incumbered with the safer he stands. He cannot please everybody by the use of it; and he will have to refuse, and consequently to displease, a greater number than he can please. Mr Jefferson gained more friends by dismissing a long train of officers than John Adams did by appointing them. Like a wise man, Mr Jefferson dismantled himself of patronage.

{Skip two paragraphs pertaining to New York.}

The Constitution of Pennsylvania, instead of being an improvement in the representative system of government, is a departure from the principles of it. It is a copy in miniature

of the Government of England, established at the conquest of that country by William of Normandy. I have shown this in part in the cases of the King's negative, and I shall show it more fully as I go on. This brings me to speak of the Senate.

The complaint respecting the Senate is the length of its duration, being four years. The sage Franklin has said, "Where annual election ends, tyranny begins"; and no man was a better judge of human nature than Franklin, nor has any man in out time exceeded him in the principles of honour and honesty.

When a man ceases to be accountable to those who elected him, and with whose public affairs he is entrusted, he ceases to be their representative, and is put in a condition of being their despot. He becomes the representative of nobody but himself. *I am elected, says he, for four years; you cannot turn me out, neither am I responsible to you in the meantime. All that you can do with me is to pay me.*

The conduct of the Pennsylvania Senate in 1800, respecting the choice of electors for the Presidency of the United States, shows the impropriety and danger of such an establishment. The manner of choosing electors ought to be fixed in the Constitution, and not be left to the caprice of contention. It is a matter equally as important, and concerns the rights and interests of the people as much as the election of members for the State legislature, and in some instances much more.

By the conduct of the Senate at that time, the people were deprived of their right of suffrage, and the State lost its consequence in the Union. The other fourteen were paired off by compromise - seven and seven. If the people had chosen the electors, which they had a right to do, for the electors were to represent them and not represent the Senate, the State would have had fifteen votes which could have been counted.

The Senate is an imitation of what is called the House of Lords in England, and which Chesterfield, who was a member of it, and therefore knew it, calls "*the Hospital of incurables.*" The Senate in Pennsylvania is not quite a hospital of incurables, but it took almost four years to bring it to a *state of convalescence.*

Before we imitate anything, we ought to examine whether it be worth imitating, and had this been done by the Convention at that time, they would have seen that the

model from which their mimic imitation was made, was no better than unprofitable and disgraceful lumber.

There was no such thing in England as what it called the House of Lords until the conquest of that country by the Normans, under William the Conqueror, and like the king's negative over the laws, it is a badge of disgrace upon the country; for it is the effect and evidence of its having been reduced to unconditional submission.

William, having made the conquest, dispossessed the owners of their lands, and he divided those lands among the chiefs of the plundering army he brought with him, and from hence arose what is called the House of Lords. Daniel de Foe, in his historical satire entitled *The True Born Englishman*, has very concisely given the origin and character of this House [skip poem].

This is the disgraceful origin of what is called the House of Lords in England, and it still retains some tokens of the plundering baseness of its origin. The swindler Dundas was lately made a Lord, and is now called *noble lord!* Why do they not give him his proper title and call him *noble swindler*, for he swindled by wholesale? But it is probable that he will escape punishment; for Blackstone, in his commentary on the laws recites an act of Parliament, passed in 1550, and not since repealed, that extends what is called the benefit of the clergy, that is, exemption from punishment for all clerical offences, to all lords and peers of the realm who could not read, as well as those who could, and also for the crimes of *house breaking, highway robbing, horse stealing and robbing of churches.*

This is consistent with the original establishment of the House of Lords, for it was originally composed of robbers. This is aristocracy. This is one of the pillars of John Adam's "stupendous fabric of human invention." A privilege for house-breaking, highway-robbing, horse-stealing and robbing of churches! John Adams knew but little of the origin and practice of the Government of England. As to constitution, it has none.

[Skip three paragraphs on Pennsylvania Convention of 1776.]

The Constitution of 1776 was conformable to the Declaration of Independence and the Declaration of Rights, which the present Constitution is not; for it makes artificial distinctions among men in the right of suffrage, which the

principles of equity knowing of; neither is it consistent with sound policy. We every day see the rich becoming poor, and those who were poor before, becoming rich. Riches, therefore, having no stability, cannot and ought not to be made a criterion of right. Man is man in every condition of life, and the varieties of fortune and misfortune are open to all.

Had the number of representatives in the Legislature established by that Constitution been increased, and instead of their sitting together in one chamber, and debating and voting all at one time, been divided by lot into two equal parts, and sat in separate chambers, the advantage would have been that, that one half, by not being entangled in the first debate, nor having committed itself by voting, would be silently possessed of the arguments, for and against, of the former part, and be in a calm condition to review the whole.

And instead of one chamber, or one house, or by whatever name they may be called, negativing the vote of the other, which is now the case, and which admits of inconsistencies even to absurdities, to have added the votes of both chambers together, and the majority of the whole to be the final decision - there would be reason in this, but there is none in the present mode. The instance that occurred in the Pennsylvania Senate, in the year 1800, on the bill for choosing electors, where a small majority in that House controlled and negatived a large majority in the other House, shows the absurdity of such a division of legislative power.

To know if any theory or position be true or rational in practice, the method is to carry it to its greatest extent; if it be not true upon the whole, or be absurd, it is so in all parts, however small. For instance, if one house consists of 260 members and the other of 50, which is about the proportion they are in some of the states, and if a proposed law be carried on the affirmative in the larger house with only one dissenting voice, and be negatived in the smaller house by a majority of 1, the event will be that 27 control and govern 223, which is too absurd even for argument, and totally inconsistent with the principles of representative government, which know no difference in the value and importance of its

members but what arises from their virtues and talents, and not at all from the name of the house or chamber they sit in.

As the practice of a smaller number negativing a greater is not founded in reason, we must look for its origin in some other cause.

The Americans have copied it from England, and it was brought into England by the Norman Conqueror, and is derived from the ancient French practice of voting by ORDERS, of which they counted three, *the Clergy* (that is, Roman Catholic clergy), the *Noblesse* (those who had titles), and the *Tiers Etat*, or Third Estate* which included all who were not of the two former orders, and which in England are called the *Commons* or *common people*, and the house in which they are represented is from thence called the *House of Commons*.

The case with the conqueror was, in order to complete and secure the conquest he had made, and hold the country in subjection, he cantoned it out among the chiefs of his army, to whom he gave castles and whom he dubbed with the title of Lords, as is before shown. These being dependent on the Conqueror, and having a united interest with him became the defenders of his measures, and the guardians of his assumed prerogative against the people; and when the house called the Common House of Parliament began by grants and charters from the Conqueror and his successors, these lords, claiming to be a distinct ORDER from the commons, though smaller in number, held a controlling or negative vote over them, and from hence arose the irrational practice of a smaller number negativing a greater.

But what are these things to us, or why should we imitate them? We have but one ORDER in America, and that of the highest degree, the ORDER OF SOVEREIGNTY, and of this ORDER every citizen is a member of his own personal right. Why then have we descended to the base imitation of inferior things? By the event of the Revolution we were put in a condition of thinking originally. The history of past ages shows scarcely anything to

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* The practice of voting by *orders* in France, whenever the States-General met, continued until the late Revolution. It was the present Abbe Sieyes who made the motion, in what was afterwards called the National Assembly, for abolishing the vote by *orders*, and establishing the rational practice of deciding by a majority of numbers.

us but instances of tyranny and antiquated absurdities. We have copied some of them and experienced the folly of them.

Another subject of complaint in Pennsylvania is the judiciary, and this appears to require a thorough reform. Arbitration will of itself reform a great part, but much will remain to require amendment. The courts of law still continue to go on, as to practise, in the same manner as when the State was a British colony. They have not yet arrived at the dignity of independence. They hobble along by the stilts and crutches of English and antiquated precedents. Their pleadings are made up of cases and reports from English law books; many of which are tyrannical, and all of them now foreign to us.

Our courts require to be domesticated, for as they are at present conducted, they are a dishonor to the national sovereignty. Every case in America ought to be determined on its own merits, according to American laws, and all reference to foreign adjudications prohibited. The introduction of them into American courts serves only to waste time, embarrass causes, and perplex juries. This reform alone will reduce cases to a narrow compass easily understood.

The terms used in courts of law, in sheriffs' sales, and on several other occasions, in writs, and other legal proceedings, require reform. Many of those terms are Latin, and others French. The Latin terms were brought into Britain by the Romans, who spoke Latin, and who continued in Britain between 400 and 500 years, from the first invasion of it by Julius Caesar, fifty-two years before the Christian era. The French terms were brought by the Normans when they conquered England in 1066, as I have before shown, and whose language was French.

These terms being still used in English law courts, show the origin of those courts, and are evidence of the country having been under foreign jurisdiction. But they serve to *mystify* by not being generally understood, and therefore they serve the purpose of what is called law, whose business is to perplex; and the courts in England put up with the disgrace of recording foreign jurisdiction and foreign conquest, for the sake of using terms which the clients and the public do

not understand, and from thence to create the false belief that law is a learned science, and lawyers are learned men.

The English pleaders, in order to keep up the farce of the profession, always compliment each other, though in contradiction, with the title of my learned brother. Two farmers or two merchants will settle cases by arbitration which lawyers cannot settle by law. Where then is the learning of the law, or what is it good for?

It is here necessary to distinguish between *lawyer's law* and *legislative law*. Legislative law is the law of the land, enacted by our own legislators, chosen by the people for that purpose. Lawyer's law is a mass of opinions and decisions, many of them contradictory to each other, which courts and lawyers have instituted themselves, and is chiefly made up of law-reports of cases taken from English law books. The case of every man ought to be tried by the laws of his own country, which he knows, and not by opinions and authorities from other countries, of which he may know nothing. A lawyer, in pleading, will talk several hours about law, but it is *lawyer's law*, and not *legislative law*, that he means.

The whole of the judiciary needs reform. It is very loosely appointed in most of the states, and also in the general government. The case, I suppose, has been, that the judiciary department in a constitution has been left to the lawyers, who might be in a convention, to form, and they have taken care to leave it loose. To say, that a judge shall hold his office during good *behavior*, is saying nothing; for the term *good behavior* has neither a legal nor a moral definition.

In the common acceptation of the term, it refers rather to a style of manners than to principles, and may be applied to signify different and contradictory things. A child of good behavior, a judge of good behavior, a soldier of good behavior in the field, and a dancing-master of good behavior in his school, cannot be [of] the same good behavior. What then is the good behavior of a judge?

Many circumstances in the conduct and character of a man may render him unfit to hold the office of a judge, yet not amount to cause of impeachment, which always supposes the commission of some known crime. Judges ought

to be held to their duty by continual responsibility, instead of which the Constitution releases them from all responsibility, except by impeachment, from which by the loose undefined establishment of the judiciary, there is always a hole to creep out. In annual elections for legislators, every legislator is responsible every year, and no good reason can be given why those intrusted with the execution of the laws should not be as responsible, at stated periods, as those intrusted with the power of enacting them.

Releasing the judges from responsibility, is in imitation of an act of the English Parliament, for rendering the judges so far independent of what is called the Crown, as not to be removable by it. The case is, that judges in England are appointed by the Crown, and are paid out of the King's civil list, as being his representatives when sitting in court; and in all prosecutions for treason and criminal offenses, the King is the prosecutor.

It was therefore reasonable that the judge, before whom a man was to be tried, should not be dependent, for the tenure of his office, on the will of the prosecutor. But this is no reason that in a government founded on the representative system a judge should not be responsible, and also removable by some constitutional mode, without the tedious and expensive formality of impeachment. We remove or turn out presidents, governors, senators, and representatives, without this formality. Why then are judges, who are generally lawyers, privileged with duration? It is, I suppose, because lawyers have had the formation of the judiciary part of the Constitution.

The term, "contempt of court," which has caused some agitation in Pennsylvania, is also copied from England; and in that country it means *contempt of the King's authority or prerogative in court*, because the judges appear there as his representatives, and are styled in their commissions, when they open a court, "His Majesty the King's Justices."

This now undefined thing, called *contempt of court*, is derived from the Norman Conquest of England, as is shown by the French words used in England, with which proclamation for silence, "on pain of imprisonment," begins,

*"Oyez, Oyez, Oyez."** [* Hear ye, hear ye, hear ye.] This shows it to be of Norman origin. It is, however, a species of despotism; for contempt of court is now anything a court imperiously pleases to call so, and then it inflicts punishment as by prerogative without trial, as in Passmore's case, which has a good deal agitated the public mind. This practise requires to be constitutionally regulated, but not by lawyers.

Much yet remains to be done in the improvement of constitutions. The Pennsylvania Convention, when it meets, will be possessed of advantages which those that preceded it were not. The ensuing Convention will have two constitutions before them; that of 1776, and that of 1790, each of which continued about fourteen years. I know no material objection against the Constitution of 1776, except that in practise it might be subject to precipitancy; but this can be easily and effectually remedied, as the annexed essay, respecting "Constitutions, Governments, and Charters," will show. But there have been many and great objections and complaints against the present Constitution and the practise upon it, arising from the improper and unequal distribution it makes of power.

The circumstance that occurred in the Pennsylvania Senate in the year 1800, on the bill passed by the House of Representatives for choosing electors, justifies Franklin's opinion, which he gave by request of the Convention of 1776, of which he was president, respecting the propriety or impropriety of two houses negativing each other. "It appears to me," said he, "like putting one horse before a cart and the other behind it, and whipping them both. If the horses are of equal strength, the wheels of the cart, like the wheels of government, will stand still; and if the horses are strong enough, the cart will be torn to pieces."

It was only the moderation and good sense of the country, which did not engage in the dispute raised by the Senate, that prevented Pennsylvania from being torn to pieces by commotion.

Inequality of rights has been the cause of all the disturbances, insurrections, and civil wars, that ever happened in any country, in any age of mankind. It was the cause of the American Revolution, when the English Parliament sat itself up to *bind America in all cases whatsoever,* and to re-

duce her to unconditional submission. It was the cause of the French Revolution; and also of the civil wars in England, in the time of Charles and Cromwell, when the House of Commons voted the House of Lords useless.

The fundamental principle in representative government is, that the *majority governs*; and as it will be always happening that a man may be in the minority on one question, and in the majority on another, he obeys by the same principle that he rules. But when there are two houses of unequal numbers, and the smaller number negativing the greater, it is the minority that governs, which is contrary to the principle. This was the case in Pennsylvania in 1800.

America has the high honour and happiness of being the first nation that gave the world the example of forming written constitutions by conventions elected expressly for the purpose, and of improving them by the same procedure, as time and experience shall show necessary. Government in other nations, vainly calling themselves civilised, has been established by bloodshed. Not a drop of blood has been shed in the United States in consequence of establishing constitutions and governments by her own peaceful system. The silent vote, or the simple yea or nay, is more powerful than the bayonet, and decides the strength of numbers without a blow.

I have now, citizens of Pennsylvania, presented you, in good will, with a collection of thoughts and historical references, condensed into a small compass that they may circulate more conveniently. They are applicable to the subject before you, that of calling a convention, in the progress and completion of which I wish you success and happiness, and the honour of showing a profitable example to the States around you and to the world.

Yours, in friendship
Thomas Paine.
*New Rochelle, NY, August 1805.*

(Note: The following "small compass" mentioned in the previous paragraph follows in the next four pages. It was written two months before the *Letter*, probably to commemorate the 1788 ratification of the Constitution.)

## ("Compass") Constitutions, Governments, and Charters

The people of Pennsylvania are, at this time, earnestly occupied on the subject of calling a convention to revise their State Constitution, and there can be but little doubt that a revision is necessary. It is a Constitution, they say, for the emolument of lawyers.

It has happened that the constitutions of all the states were formed before any experience had been had on the representative system of government; and it would be a miracle in human affairs that mere theory without experience should start into perfection at once. The Constitution of New York was formed so early as the year 1777.

The subject that occupied and engrossed the mind of the public at that time was the Revolutionary War, and the establishment of independence, and in order to give effect to the Declaration of Independence by Congress it was necessary that the states severally should make a practical beginning by establishing state constitutions, and trust to time and experience for improvement. The general defect in all the constitutions is that they are modeled too much after the system, if it can be called a system, of the English Government, which in practise is the most corrupt system in existence, for it is corruption systematized.

An idea also generally prevailed at that time of keeping what were called the legislative, the executive, and the judicial powers distinct and separated from each other. But this idea, whether correct or not, is always contradicted in practise; for where the consent of a governor, or executive, is required to an act before it can become a law, or where he can by his negative prevent an act of the legislature becoming a law, he is effectually a part of the legislature, and possesses full one-half of the powers of a whole legislature.

{Skip one paragraph pertaining to New York.}

When we see maxims that fail in practise, we ought to go to the root, and see if the maxim be true. Now it does not signify how many nominal divisions, and sub-divisions, and classifications we make, for the fact is, *there are but two powers in any government, the power of willing or enacting the laws, and the power of executing them;* for what is

called the *judiciary* is a branch of executive power; it executes the laws; and what is called the *executive* is a superintending power to see that the laws are executed.

Errors in theory are, sooner or later, accompanied with errors in practise; and this leads me to another part of the subject, that of considering a constitution and a government relatively to each other.

A constitution is the act of the people in their original character of sovereignty. A government is a creature of the constitution, it is produced and brought into existence by it. A constitution defines and limits the powers of the government it creates. It therefore follows, as a natural and also a logical result, that the governmental exercise of any power not authorized by the constitution is an assumed power, and therefore illegal.

There is no article in the Constitution of this State, nor of any of the states, that invests the Government in whole or in part with the power of granting charters or monopolies of any kind; the spirit of the times was then against all such speculation; and therefore the assuming to grant them is unconstitutional, and when obtained by bribery and corruption is criminal. It is also contrary to the intention and principle of annual elections.

Legislatures are elected annually, not only for the purpose of giving the people, in their elective character, the opportunity of showing their approbation of those who have acted right, by re-electing them, and rejecting those who have acted wrong; but also for the purpose of correcting the wrong (where any wrong has been done) of a former legislature. But the very intention, essence, and principle of annual election would be destroyed, if anyone legislature, during the year of its authority, had the power to place any of its acts beyond the reach of succeeding legislatures; yet this is always attempted to be done in those acts of a legislature called charters.

Of what use is it to dismiss legislators for having done wrong, if the wrong is to continue on the authority of those who did it? Thus much for things that are wrong. I now come to speak of things that are right, and may be necessary.

Experience shows that matters will occasionally arise, especially in a new country, that will require the exercise of a power differently constituted to that of ordinary legislation; and therefore there ought to be in a constitution an article, defining how that power shall be constituted and exercised. Perhaps the simplest method, that which I am going to mention, is the best; because it is still keeping strictly within the limits of annual elections, makes no new appointments necessary, and creates no additional expense.

For example, that all matters of a different quality to matters of ordinary legislation, such, for instance, as sales or grants of public lands, acts of incorporation, public contracts with individuals or companies beyond a certain amount, shall be proposed in one legislature, and published in the form of a bill, with the yeas and nays, after the second reading, and in that state shall lie over to be taken up by the succeeding legislature; that is, there shall always be, on all such matters, one annual election [which] takes place between the time of bringing in the bill and the time of enacting it into a permanent law.

It is the rapidity with which a self-interested speculation, or a fraud on the public property, can be carried through within the short space of one session, and before the people can be apprised of it, that renders it necessary that a precaution of this kind, unless a better can be devised, should be made an article of the Constitution.

Had such an article been originally in the Constitution, the bribery and corruption employed to seduce and manage the members of the late Legislature, in the affair of the Merchants' Bank, could not have taken place. It would not have been worth while to bribe men to do what they had not the power of doing. That Legislature could only have proposed, but not have enacted the law; and the election then ensuing would, by discarding the proposers, have negatived the proposal without any further trouble.

This method has the appearance of doubling the value and importance of annual elections. It is only by means of elections, that the mind of the public can be collected to a point on any important subject; and as it is always the in-

terest of a much greater number of people in a country, to have a thing right than to have it wrong, the public sentiment is always worth attending to. It may sometimes err, but never intentionally, and never long.

The experiment of the Merchants' Bank shows it is impossible to bribe a small body of men, but it is always *impossible* to bribe a whole nation; and therefore in all legislative matters that by requiring permanency differ from acts of ordinary legislation, which are alterable or repealable at all times, it is safest that they pass through two legislatures, and a general election intervene between. The elections will always bring up the mind of the country on any Important proposed bill, and thus the whole state will be its own *Council of Revision*. (Skip last sentence on Merchants' Bank).

Common Sense.
New Rochelle, June 21, 1805.

## I. Definitions: CONSTITUTION & CONSTITUTIONALISM

*These definitions are by Charles P. Schleicher (1907-97), who taught international relations and politics for 30 years at University of Oregon (died in Eugene 1997), from the Dictionary of the Social Sciences as edited BY Julius Gould and William L. Kolb by the United Nations Educational, Scientific, and Cultural Organization in 1964 (pp 131-34).*

*Apart from the United Kingdom, a constitution is collection of the rules relating to the organization of government as contained in a written document.*

### CONSTITUTION

A. Aside from literal usage, and infrequent usages such as that denoting an act of establishing, *constitution* designates something about government. In a formal sense it may refer to (a) a fundamental legal document, or (b) the fundamental institutions of a state-the laws, customs, and great conventions, or (c) the total system of laws and customs. In the sense of constitutionalism (q.v.), *a constitution* is a set of devices to subject the freedom of the holders of political power to limitations and restraints.

In a literal sense, everything has a constitution-in the sense of the sum of its parts. Although often used in this non-technical sense, usage has given it narrower meaning. Scholarly analysis and definition have been confined almost exclusively to the constitution of the state, yet most concepts derived therefrom apply equally well to constitutions of other organizations.

B. As a formal term, constitution has evolved from broad to relatively narrow meanings.

1. The Greek *politeia,* usually translated as constitution, designated the numerous characteristics-economic, social, and governmentalof a state, in the same sense as we speak of the constitution of matter. Later, down to the 16th century, constitution meant a secular or ecclesiastical edict or regulation and was used interchangeably with such words as *lex* or *edictum,* as distinguished from *consuetudo* or custom.

2. In subsequent usage the term came to mean government, and usually a particular aspect of it-its framework or fundamentals. For exampie, according to H. Finer, "The system of fundamental political institutions is the constitution

... lit] is the autobiography of a power relationship' (*The Theory and Practice of Modern Government*, London: Methuen, 1949, p. 116). To Bryce the term was more inclusive. It was'... the aggregate of the laws and customs through and under which the public life of a state goes on'; or 'the complex totality of laws embodying the principles and rules whereby the community is organized, governed, and held together' (J. Bryce, *Studies in History and Jurisprudence*, Oxford: at the Clarendon Press, 1901, vol. I, pp. 159, 256). Laws of 'superior importance', 'fundamental laws', 'only matters affecting the sovereign power of government', are typical characterizations of constitution. *Fundamental* is obviously an indefinite term on which opinions differ.

3. Along with the practice, beginning in the 16th century, of attempting to codify the essentials of government in legal documents, there was a tendency on the part of many people, legislators and scholars, to adopt a'documentation' usage of *constitution*. The codification became the constitution. Although most political science definitions are broader, in usage they frequently designate a document. Probably no such codifications include all that is fundamental nor omit all that is superficial.

C. Although 'fundamentals' are a part of most definitions of constitution, implicitly or explicitly the majority also inject a note of constitutionalism, such as laws and customs 'to which the community hath agreed', 'the rights of the governed', and so forth. E. M. Sait objects: 'Not one of these qualifications can be accepted. In the light of present good usage it is impossible to contend that a state, however autocratic the government may be, can exist without a constitution, or that the frame of government is not a constitution ...' unless it contains limitations on government (*Political Institutions*, New York: D. Appleton-Century, 1938, p. 314).

Those who define *constitution* in the light of constitutionalism grudgingly concede that *constitution* may refer simply to framework, but argue that a'true' constitution always restrains. 'But whatever its form, a true constitution will have the following facts about it very clearly marked: first, how the various agencies are organized; secondly, what power is entrusted to those agencies; and

thirdly, in what manner such power is to be exercised. ... The objects of a constitution ... are to limit the arbitrary action of the government, to guarantee the rights of the governed, and to define the operation of the sovereign power' (C. F. Strong, *Modern Political Constitutions*, London: Sidgwick & Jackson, 1949, p. 10). C. J. Friedrich speaks of constitutions in a functional sense arguing that 'to render a government constitutional required establishing and maintaining effective restraints' (*Constitutional Government and Democracy*, Boston: Ginn, 1946, p. 121).

CONSTITUTIONALISM

A. *Constitutionalism* (or *constitutional government*) denotes a system of effective regularized restraints upon the authoritative decisionmakers in a political society. In short, it is the rule of law or limited government in contrast to arbitrary rule. All governments fall somewhere between the extremes of 'no restraint' and 'complete restraint'; constitutional government is a matter of degree and of definition. The British, for example, have become used to equating 'limited government' with restraints on the substance of governmental and legislative power, whereas the rule of law may mean simply procedural restraint in the sense of equality before the law, *nulla poena sine lege*, etc.; and some would regard the latter procedural safeguards as a sufficient indicator of constitutionalism.

Standards in the form of conventions, morals, and law are essential, but to modern constitutionalists insufficient. Hence standards, plus institutionalized safeguards, are the essentials for the realization of constitutionalism.

B. The primary basis of constitutionalism is a standard or norm against which governmental action is measured; constitutional government is conformance with the norms. From the Greek to the modern age these norms have been visualized as some kind of natural or divine order, custom, or positive law.

1. Modern constitutionalism begins with attempts to provide legal techniques and political machinery for controlling rulers who employed their power despotically in disregard of 'constitutional' obligations. Many writers see the beginning of modern constitutionalism in the Conciliar Movement directed

against the Church, and gradually carried over into the state, where it was applied against absolutism by religious dissenters from a state-controlled church, and by trading groups which found themselves hampered by mercantilist policies. Calvin endorsed constitutionalism by acknowledging that people might resist rulers who governed contrary to God's will. Coke waged his battle against the Stuarts in the name of constitutionalism. The Glorious Revolution of 1688 is usually regarded as marking the triumph of constitutionalism in England. The American Revolution was fought under the banner of revolt against 'Acts of pretended Legislation'.

2. The methods of holding wielders of political power responsible are the distinctive marks of modern constitutionalism.

(a) In the case of the United Kingdom, under its uncodified constitution and parliamentary legal omnipotence, most writers see the main restraint as 'powerful tradition'.

(b) C. J. Friedrich *(Constitutional Government and Democracy,* Boston: Ginn, 1946, pp. 1212) thinks that perhaps the most important is '... the alteration of government between two or three parties ...'.

(c) The codification of fundamentals in a basic legal document (constitution) restrains by clarifying powers and limitations; moreover, the resulting document tends to become a political force of its own. Such devices are apparently increasingly regarded as a necessary part of the 'impedimenta of statehood'.

(d) Judicial review, of executive actions in Great Britain and of legislation as well in the United States, is generally regarded as among the more effective restraints. Since constitutional law is supposedly more basic than ordinary law, constitutionalism frequently expresses itself by imposing greater obstacles in the way of changing the former.

(e) Friedrich argues that the division of powers is the basis of civilized government, and that that is 'what is meant by constitutionalism' (ibid., p. 4). Again '... the maintenance of all restraints depends in the end upon a balance of groups and classes in the community to whose government they apply' (ibid., p. 124). It follows, therefore, that various forms of functional and geographic separation of power, serve to check power, and thus limit it on the domestic scene as the balance of power (q.v.) is supposed to do internationally.

## K. Definition of Corporatism (Also Corporativism)

*The following definition is from the Dictionary of the Social Sciences as edited By Julius Gould and William L. Kolb by the United Nations Educational, Scientific, and Cultural Organization in 1964, pp 141-142. It is by William Ebenstein (1910-1976), a prolific writer and political scientist with an international reputation.**

A. ***Corporatism*** denotes the theory, developed in fascist Italy, justifying the organization of the economic system into 'corporations' subordinate to the state and claiming that such a reorganized economic system renders superfluous political representative institutions.

B. 1. Attacking both socialism and capitalism, Italian fascism sought to reorganize the economic life and structure of Italy through a mechanism of control called *corporatism.* The economy was divided into associations of workers, employers, and the professions, and such associations were called syndicates. Only one syndicate was allowed in each

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* He published more than a hundred books and articles, many of which were translated. He received a LL.D. degree from the University of Vienna in 1934. His first book, *Fascism at Work*, was published in 1934. This was followed by *Fascist Italy* in 1939, *The Nazi State* in 1943, and *The German Record* in 1945. In Austria he became one of Hans Kelsen's foremost expositors in a classic study *The Pure Theory of Law* (1945). He studied for two years at the University of London before enrolling for graduate work at the University of Wisconsin, where he was appointed a fellow in economics in 1936 and a research associate in law in 1937. In 1946 he left Wisconsin to accept an appointment at Princeton University, where he served for sixteen years. In 1962 he joined the political science faculty at the University of California, Santa Barbara. Despite a wide range of professional interests, his specialization was political philosophy or comparative government and became a leading authority of totalitarianism and pioneer in shifting the study of comparative government from a heavily institutional emphasis to one with a greater concern for ideological, cultural, and psychological interrelationships. He also won wide recognition as a successful author of leading textbooks. For nearly three decades, staples in political science curricula included such titles as *Man and the State* (later *Modern Political Thought*); *Great Political Thinkers*; *American Democracy in World Perspective* (senior coauthor); *Today's Isms: Communism, Fascism, Capitalism, Socialism.* The last title, first published in 1954, passed seven editions, to reach hundreds of thousands of readers in English, besides foreign-language translations.

branch of industry or business, and though membership in the syndicates was not a legal requirement, the payment of dues was. The officials of the syndicates were either fascist politicians or persons of reliable loyalty to the fascist regime. In effect, these associations of workers and employers were nothing but instruments of state policy, with little will or life of their own.

To make this dependency of the vocational associations (or syndicates) of capital and labour even more certain and obvious, the fascist government, in 1934, established *corporations*, the purpose of which was to unite the associations of workers and employers in a given industry in one administrative agency. According to law, the syndicates were autonomous, but, *de facto*, were run by the state. The corporation, supreme instrument of fascist economic organization and control, made no pretence of autonomy, as it was nothing but an administrative agency of the state, in no way different from the police, the judiciary, and other tools of fascist government using totalitarian methods. To emphasize the role of the corporations as governmental agencies, a new 'Ministry of Corporations' was set up, directly dependent, as were all, other ministries, on the dictator, Benito Mussolini.

2. The philosophy of corporatism rested on two assumptions. First, man should not be politically articulate as *a citizen*, but only as a worker, entrepreneur, farmer, doctor, or lawyer; general political problems are assumed to be too complicated for the mass of the people, who are only expected to understand issues that bear directly on their professional or vocational work. Second, members of a small ruling class are supposed to understand broad issues that effect the whole society, and they alone are therefore qualified to govern the community. This conception is Platonic in origin, and in modern times anti-democratic thinkers like Burke and Hegel have supported it against the claims of democratic theory. In his speech of November 14, 1933, Mussolini stated that the essential bases of corporatism were a single party, a totalitarian government, and an atmosphere of strong ideal tension. The fascist party provided the first two elements, and the strong ideal tension was supplied by the ceaseless propaganda of expansionist imperialism.

Wherever Italian fascism was copied, corporatism was eagerly adopted, as in Portugal in 1933, in Austria in 1934, in Spain in 1939, and in the Western Hemisphere in Brazil in 1937, and finally in Argentina during the dictatorship of Peron (1943-55). As soon as the totalitarian system is replaced by a liberal regime, as happened in Austria (1945), Brazil (1944), and Argentina (1955), corporatism gives way at once for the free associations of workers and employers, independent of the state in law and in fact.

C. The fascist corporations were, as D. Mack Smith points out, 'more an aspiration than a reality' (*Italy*, Ann Arbor: University of Michigan Press, 1959, p. 395). For many years after 1926--when they were provided for by law--they were non-existent. 'On May 9, 1934 the Central Corporative Committee, Mussolini presiding, finally decided to bring into existence, in June, 1934, twenty-two corporations representing various occupations' (W. Ebenstein, *Fascist Italy*, New York: American Book Co., 1939, p. 140). In 1939 the Chamber of Fasces and Corporations was set up--to replace the last vestiges of the parliamentary system. The corporations were, in fact, 'little more than an attempt to keep a tight hold on the workers in strictly centralised unions' D. Mack Smith, *Italy, p.* 395). But Mussolini and his circle attempted to stress the corporate motif in their ideology as a significant and crucial innovation. They claimed that it signalled the end of economic liberalism and that corporatism was 'disciplined and hence controlled economics'.

D. The fascist corporation is not to be confused with the ancient Roman corporation which owed its existence and operation to the free will of individual citizens who banded together for multifarious purposes, as long as such purposes were not against the law or public order and morality. Nor is the fascist corporation to be confused with the American or British business corporation -- a company of limited liability, owned and operated by private citizens, and generally engaged in business. Above all, the American business corporation, like the ancient Roman corporation, is not a creature of the state, but comes into existence when individual citizens spontaneously band together for whatever purpose, as long as it is legal. ☆☆☆

## Certification of Purpose and Compliance

Based on Rule 44, I have restricted this petition to substantial grounds and the intervening revelations (Koch brothers) not previously presented. I certify that the petition is presented in good faith and not for delay.

As required by Supreme Court Rule 33.1(h), I certify that the body of this petition for a Petition for Rehearing contains under 2950 words, which excludes parts that are exempted by Supreme Court Rule 33.1(d). A more specific count is provided as a footnote to the contents page.

I declare under penalty of perjury that both foregoing certifications are true and correct.

Victor Madeja, *pro se*

Executed on 28 October 2010